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No. 99-2062

IN THE

Supreme Court of the United States

CLIFFORD ALEXANDER, *et al.*,

Appellants,

v.

WILLIAM M. DALEY,
Secretary of Commerce, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the continued denial to District of Columbia residents of the right to voting representation in the House of Representatives violates the equal protection guarantee of the Fifth Amendment's due process clause and the guarantee secured by Section 1 of the Fourteenth Amendment of the fundamental rights of national citizenship.

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INTEREST OF THE *AMICUS CURIAE*

The American Bar Association, with more than 400,000 members, is the leading national membership organization of the legal profession. Its members come from each of the fifty states and the District of Columbia. Membership is voluntary, and includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields.[1]

The ABA House of Delegates, at its August 1999 Annual Meeting, adopted the following Resolution:

> RESOLVED, that the American Bar Association supports the principle that citizens of the District of Columbia shall no longer be denied the fundamental right belonging to other American citizens to vote for voting members of the Congress which governs them.

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1. This brief is filed with the consent of both appellants and appellees. Pursuant to the Court's Rule 37.6, *amicus curiae* ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The amicus brief is submitted in accordance with this policy of the Association, and to assist in securing implementation of the principle which it supports.

The ABA has consistently worked for the extension of the right of suffrage, both in this country and abroad. One of the ABA's basic goals is to promote the rule of law — a basic principle of which is denied when those governed by the laws of Congress are precluded from voting for those who enact them. The ABA has adopted resolutions supporting increased voter participation in national elections, and fair Congressional redistricting. The ABA has also endorsed the International Covenant on Civil and Political Rights, which provides in Article 25 that: "*Every citizen* shall have the right . . . to vote . . . at genuine periodic elections which shall be *by universal and equal suffrage*. . . ." (Emphasis supplied.) The ABA is concerned with the denial of that right wherever it occurs, and most particularly close to home, in our nation's capital.[2]

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2. Amicus notes that the general public also appears to support the principle of voting representation in Congress for the District of Columbia. A recent survey reported that, among a representative sample of U.S. adults polled, 72 percent supported voting rights in Congress for citizens of the District of Columbia. "7 of 10 Back D.C. Voting Rights," Washington Post, April 13, 2000, at B3; "Vote of Confidence," Washington Times, April 14, 2000, at C4.

ARGUMENT

DENYING D.C. CITIZENS THE RIGHT TO VOTING REPRESENTATION IN CONGRESS RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

The ABA Resolution, quoted *supra*, attacks the denial of voting representation in Congress on two basic grounds: (1) denial to D.C. citizens of suffrage rights equal to those of other American citizens; and (2) denial to D.C. citizens of a fundamental right of American citizens. These two policy grounds correspond to two constitutional challenges to the denial of D.C. citizens' rights to voting representation in Congress: (1) the denial violates the equal protection guarantee provided by the Fifth Amendment due process clause; and (2) the denial violates a fundamental right and privilege of U.S. citizenship secured by Section 1 of the Fourteenth Amendment.

Both of these constitutional challenges to the current denial of the franchise, *amicus* submits, warrant plenary review. If upon such review this Court sustains either or both of these challenges, the Court might deem it unnecessary to resolve the difficult Article I issues that so sharply divided the court below in interpreting the Framers' original design. Alternatively, in order to avoid the need to resolve the constitutional challenges to the apportionment statute under the Fifth and Fourteenth Amendments, the ambiguities in Article I might be resolved so as to uphold the interpretation of Article I given by the dissenting judge below, and the position of appellants here.

A. Due Process/Equal Protection Guarantees Under The Fifth Amendment

The Fifth Amendment, containing the due process clause, was ratified with the rest of the Bill of Rights in 1791. In 1954 this due process clause was held to include a guarantee, as against the federal government, of equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (decided together with *Brown v. Board of Education*). Accordingly, the Congressional statutes segregating the D.C. public schools were held in *Bolling* to violate the Fifth Amendment's due process guarantee.

Subsequent Supreme Court cases have made it clear that this Fifth Amendment guarantee of equal protection is fully equivalent in its scope to the Fourteenth Amendment's guarantee of equal protection of the laws. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (collecting cases).

1. D.C. Residents Are Denied Protection Equal to That of Residents of the 50 States

The long line of Supreme Court cases that have applied the Fourteenth Amendment's equal protection guarantee in striking down state apportionment statutes which violated the principle of "one person, one vote" should also be applicable, under *Bolling* and its progeny, in determining

whether federal legislation violates the right of D.C. citizens to an equal voice with citizens of the 50 states in elections for the Congress which governs them all. But as to D.C. citizens in Congressional elections, the present rule is "one person, no vote." This disparity and disenfranchisement cannot withstand the scrutiny required by the Fifth Amendment guarantee of equal protection, any more than a denial to residents of one particular locality of the right to vote in statewide elections could withstand the scrutiny mandated by the equal protection guarantee of the Fourteenth Amendment. "[T]he weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds v. Sims*, 377 U.S. 533, 567-68 (1964). "Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society. . . . [A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 561-62.

Accordingly, Judge Oberdorfer's dissenting opinion below applies a "strict scrutiny" test and concludes that the denial of suffrage to D.C. residents in elections for Representatives violates the equal protection guarantee of the Fifth Amendment due process clause, since no compelling governmental interest is involved. (See 131-33a.)[3] The opinion also notes that this denial of suffrage cannot pass muster even under the alternative, less stringent tests of scrutiny used in evaluating other equal protection challenges, involving denials of rights less fundamental than voting. (132a.)

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3. For the convenience of the Court and the parties, page citations by *amicus* to the opinions below will be to the pages of Appellants' Appendix.

The majority opinion below acknowledges that the denial of suffrage in issue here would not pass the strict scrutiny test of the Fifth Amendment's equal protection guarantee. "We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government." (59a; footnote omitted.) But, the majority goes on to hold, "strict scrutiny does not apply in this case," and equal protection analysis is not pertinent, because "the voting qualification of which plaintiffs complain is one drawn by the Constitution itself" in Article I, Section 2. In the majority's view, "the right to equal protection cannot overcome the line explicitly drawn by that Article." (59-60a.)

The basic flaw in the majority's approach, which regards the language of Article I, Section 2 as controlling, is that the Fifth Amendment due process guarantee was adopted *subsequent* to Article I. The original Constitution was ratified in 1788; the Bill of Rights was ratified in 1791. If Article I provisions conflict with the Fifth Amendment guarantee, then the later enacted constitutional language should control. To be sure, 163 years passed before the Supreme Court construed the Fifth Amendment due process clause to include a guarantee of equal protection. But that is no reason to withhold application of equal protection guarantees now. As this Court pointed out in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), in striking down the Virginia poll tax on equal protection grounds and overruling prior precedent in order to do so: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." (*Id.* at 669; emphasis in original.) Here, as in *Harper*, the Court should apply the equal protection

guarantee according to current notions of equal protection for the right of suffrage. Perhaps the most recent statement of this notion is in Justice Breyer's concurring opinion, joined by Justice Ginsburg, in *Nixon v. Shrink Missouri Government PAC*, No. 98-963, 68 U.S.L.W. 4102, 4108 (U.S. Jan. 24, 2000). Justice Breyer there characterizes *Reynolds v. Sims, supra*, as meaning that: "in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice.' "

In order to give "each citizen" of D.C. "an equally effective voice," in the context of Congressional apportionment, 13 U.S.C. § 141(b) as construed by the defendant Secretary of Commerce must be held invalid, and D.C. residents counted in the apportionment process. Applying current Fifth Amendment concepts of equal protection to the Organic Act of 1801 which terminated District residents' voting for Congress (see 87-89a), that Act should be deemed invalid insofar as it repealed the provisions of prior law which had enabled District residents to vote for representatives in Congress in the federal elections conducted by Maryland and Virginia. By repealing those provisions — and not replacing them with any alternative means for District residents to vote for Congress — the Act deprived District residents of a Fifth Amendment due process right to a voice in Congress which was "equally effective" with that of residents of Maryland, Virginia, and the other states.[4]

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4. Under this analysis, the deprivation worked by the Organic Act of 1801 was not of merely personal rights which died with the generation of individuals who had possessed them in 1800, as the majority opinion holds (see 49-50a). Rather, the 1801 statute effected a deprivation of constitutional due process rights to an equal voice in Congress; such due process rights would inure to D.C. residents of every generation, and thus be enforceable by D.C. residents today.

2. D.C. Residents Are Denied Protection Equal to That of Enclave Residents

Under this Court's decision in *Evans v. Cornman*, 398 U.S. 419 (1970), residents of a State-ceded federal enclave retain the right to an equal voice with the ceding state's citizens in electing Representatives to Congress. The equal protection clause of the Fourteenth Amendment secures to residents of federal enclaves this "constitutionally protected right to cast an equally weighted vote" (to use the language of *Lucas v. Colorado*, 377 U.S. 713, 736 (1964)). This is so, *Evans* holds, notwithstanding the fact that, under the terms of Article I, Section 8, Clause 17, a ceded enclave is subject to the very same grant of Congressional power "To exercise exclusive Legislation" as is the District ceded for the seat of government.

Amicus submits that this disparate access to the Congressional franchise for enclave and D.C. residents denies to the latter equal protection of the law. The apportionment statute, 13 U.S.C. § 141(b), when applied to count enclave but not D.C. residents in apportioning House seats, violates the Fifth Amendment's due process/equal protection guarantee of D.C. residents' "right to cast an equally weighted vote" for Congress.

The majority opinion below, although acknowledging that such an *Evans*-based argument has "some appeal" (54a), seeks to avoid this consequence of *Evans* by concluding (56-57a) that a district court is bound to reject it under the authority of this Court's summary affirmance in *Albaugh v. Tawes*, 379 U.S. 27 (1964). To be sure, the majority below recognizes "there may be tension between *Evans* and *Albaugh*" (56a) and appears to invite Supreme Court

resolution of this tension. ("We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*", 57a.) Need for resolution by the Supreme Court of this apparent conflict between the rationales of its decisions in *Evans* and in *Albaugh* — as *Albaugh* is read by the majority below — would in itself afford a sufficient reason for noting probable jurisdiction herein.

Amicus respectfully submits, however, that the majority below errs when it relies on the summary affirmance in *Albaugh* as controlling authority to reject the appellants' Fifth Amendment due process/equal protection challenge to disparate treatment of D.C. and enclave residents' rights to voting representation in the House. The Supreme Court's affirmance, without opinion, of the judgment of the three-judge district court in *Albaugh* does not foreclose, or even speak to, the Fifth Amendment equal protection argument raised in the instant suit. The two-page district court opinion in *Albaugh* contains no discussion or indication of any challenge by Mr. Albaugh under the Fifth Amendment due process clause. Nor does the analysis of Albaugh's Jurisdictional Statement presented by the majority below (see 41a) suggest that the appellant Albaugh sought to raise such a Fifth Amendment challenge in this Court. Accordingly, this Court's summary affirmance of the *Albaugh* district court's judgment should not be read to conflict with or detract from the force of *Evans'* equal protection analysis. *Evans* supports the equal protection claim here, while *Albaugh* simply does not address that constitutional issue.[5]

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5. It is doubtful that plaintiff Albaugh would even have possessed standing to challenge an alleged denial of Fifth Amendment equal protection to D.C. residents. Mr. Albaugh was

(Cont'd)

3. D.C. Residents Are Denied Protection Equal to That of U.S. Residents Domiciled Overseas

Congress has provided that residents of any of the 50 states who move their domicile overseas may continue to vote (or vote for the first time) in Congressional elections held in the state wherein they were last domiciled. No present or continuing connection with such state is required. The voting is by absentee ballot. See Overseas Citizens Voting Rights Act, 42 U.S.C. § 1973ff-1 *et seq.*

Thus, for example, a New York attorney who moves his or her practice and domicile to Brussels or London retains the right to vote for representation in the U.S. Congress, by

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(Cont'd)
not a D.C. resident, nor did he purport to bring his suit on behalf of D.C. residents. Rather, as the caption in the district court indicated, Albaugh expressly filed his suit in the capacity of a Maryland primary election candidate. *William A. Albaugh, Republican Candidate in the Contested 1964 Maryland Primary Election for United States Senator Nomination v. J. Millard Tawes, Governor of Maryland, et al.*, 233 F. Supp. 576 (D. Md. 1964). Albaugh sought, as a defeated candidate, to have the Republican Senatorial Primary Election declared null and void on the ground that D.C. residents did not vote in that primary election. His complaint asked the court to declare "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator elections. . . ." *Id.* at 576. The district court dismissed the complaint, holding that the passage by Congress of the "Organic Act of 1801" had terminated the Maryland citizenship of residents of the area ceded to form the District of Columbia, leaving them "no right to vote in Maryland elections generally, and specifically, in the selection of United States Senators." *Id.* at 577. The opinion did not go on to consider whether the 1801 statute might have violated D.C. residents' constitutional right to equal protection under the Fifth Amendment.

casting an absentee ballot mailed to New York. But if that same attorney relocates the attorney's domicile from New York to Washington, D.C., then he or she loses the right to vote for a voting Representative in Congress. Congress' action (through 13 U.S.C. § 141(b)) in denying D.C. residents the right to voting representation in the Congress which enacts the federal and local laws that govern the lives of the citizens of the nation's capital, while Congress confers the Congressional franchise upon residents who have chosen to live abroad and largely under foreign legislation, appears paradoxical. This disparate treatment of voting rights cannot withstand the "strict scrutiny" required by the due process/ equal protection clause. (See the dissent below at 138-42a.) No compelling interest of the federal government requires this denial of equal voting rights to D.C. residents; both the majority (see 59a) and the dissent (see 141-42a) agree that the defendants herein have offered no compelling justification for such a denial of voting Congressional representation for D.C. residents. Accordingly, *amicus* submits, this ground of plaintiff's equal protection challenge should be sustained, or at least entertained as a substantial constitutional issue warranting plenary review.

The majority, however, suggests in a footnote that the plaintiffs may not be able to question the disparity of treatment between those who move from a state to D.C. and those who move overseas, because the suit is "brought on behalf of all District residents regardless of whether they have ever lived in a state. . . ." (62a, n.62.) The majority's suggestion in this regard should be rejected. The complaint identifies various plaintiffs who moved to the District of Columbia from States where they had the right to vote for representation in Congress. (See Complaint, 176a *et seq.*)

B. Privileges of National Citizenship Under the Fourteenth Amendment

The Citizenship Clause of the Fourteenth Amendment confers, as a privilege of national citizenship, the right to vote for national officers. That proposition is common ground for the two-judge majority and the plaintiffs. It is based upon language in *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), and language in the concurring opinion of Justice Kennedy in *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838-45 (1995). Thus the majority opinion below states:

> We do not disagree that the "right to vote for national officers' is a 'right[ ] and privilege[ ] of national citizenship.' " *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). . . . Nor do we dispute Justice Kennedy's statements, in a concurrence repeatedly cited by plaintiffs, that . . . "[T]he federal right to vote . . . belong[s] to the voter in his or her capacity as a citizen of the United States."

(63a, footnote and parentheses omitted; the quotation from Justice Kennedy's opinion is cited to *U.S. Term Limits* at 844.)

In a recent decision, which breathed new life into the Fourteenth Amendment's privileges and immunities clause, the Supreme Court held that "the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the states." *Saenz v. Roe*, 526 U.S. 489, 507-08 (1999). The Court accordingly struck down federal legislation, as well as state law provisions, that were held to violate the

right of national citizens to travel to and settle in another state, because these federal and state statutory provisions had authorized California, in violation of the Fourteenth Amendment's guarantees, to make smaller welfare payments to residents newly arrived from other states than to longer-term California residents.

It should follow that the Citizenship Clause of the Fourteenth Amendment would likewise prohibit the national government from legislating to deny residents of the District of Columbia the same "right to vote for national officers [which] is a right and privilege of national citizenship" enjoyed by all other citizens who are domiciled on the U.S. mainland (or who have moved their domicile abroad).[6]

The court below relied heavily on the case of *Loughborough v. Blake*, 18 U.S. 643, 647 (1820), for the view that D.C. residents had "voluntarily relinquished their right of representation" in Congress. That statement, which was dictum, does not merit nearly as much precedential

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6. During the Senate's consideration of a proposed constitutional amendment in support of District of Columbia voting representation, Senator Robert S. Dole of Kansas said:

> The absence of voting representation for the District in Congress is . . . an unjustifiable gap in our scheme of representative government. . . . It seems clear that the framers of the Constitution did not intend to disenfranchise a significant number of Americans by establishing a Federal District. I believe that the framers would have found the current situation offensive to their notions of fairness and participatory government.

(124 Cong. Rec. 27254-55).

weight as the majority accorded it. (See 37a, 71a). The case involved a challenge to the validity of a direct tax imposed on D.C. residents which was apportioned on the basis of the census. The dictum was not needed to decide the issue in the case; the case did not involve a challenge to the constitutionality of D.C. residents' disenfranchisement on Fifth or Fourteenth Amendment grounds. Even Chief Justice Marshall acknowledged in *Loughborough* that "in theory it might be more congenial to the spirit of our institutions to admit [to Congress] a representative of the District. . . ." *Loughborough, supra*, at 647. Moreover, the case was decided nearly half a century before the ratification of the Fourteenth Amendment, which recognized the rights of national citizenship, including the right to vote for Congress.

Because the federal apportionment statute as applied violates D.C. residents' rights of national citizenship to vote in elections for national legislative officers, the statute as so applied should be held invalid under the Fourteenth Amendment. At the least, its validity *vel non* presents a substantial question, which this Court should note probable jurisdiction to resolve in this case.[7]

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7. If this Court rules that District residents have a constitutional right to voting representation in the House, the form of remedy to vindicate that right would, in the first instance, be a matter to be decided by the Congress. For instance, Congress might create a separate District seat, or provide for D.C. residents to vote in Congressional elections in Maryland. But just as "one person one vote" redistricting of the House did not come about until this Court required it, a declaration by this Court that D.C. residents have a constitutional right to such representation appears to be a critical prerequisite for attaining apportionment of representation to them.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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